

**MONTANA PUBLIC DEFENDER COMMISSION
MINUTES**

**State Capitol Building – Room 172
Helena, Montana**

AUGUST 31, 2006

(Approved at the October 13, 2006 Commission Meeting)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:40 a.m.

Commissioners Present

Betty Bichsel, Edgar; Dan Donovan, Great Falls; Stephen Nardi, Kalispell; Wendy Holton, Helena; Mike Sherwood, Missoula; Caroline Fleming, Miles City; Tara Veazey, Helena; Doug Kaercher, Havre; Ivan Small, Poplar; and James Park Taylor, Missoula.

Commissioners Absent

Commissioner Jennifer Hensley, Butte

Other Interested Parties

Scott Crichton, Executive Director, American Civil Liberties Union (ACLU); Don Kinman, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Robin Rowe, AFSCME; Kerry Newcomer, Office of the State Public Defender (OPD) Conflicts Coordinator

Approval of July 31, 2006 Minutes

The following corrections were made to the minutes:

Commissioner Veazey's name was corrected throughout.

Commissioner Sherwood moved to approve the minutes as corrected. Motion carried.

Response to Senator Shockley's Letter

Chairman Taylor distributed his response to Senator Shockley's concerns for review (exhibit 1). The Commission was satisfied.

Reports

Chief Public Defender Report

- *Public Defender System Update (Chief Randi Hood)*

At the end of two months, the dust is beginning to clear and all offices are running, although some are in temporary locations. Chief Randi Hood applauded the public defenders in the existing offices for hitting the ground running on July 1.

Chief Hood noted the need to do some education around the misperception that we are able to recruit former prosecutorial staff because we pay more. In reality, most of the people that have been hired from various county prosecutorial operations are taking pay cuts to work for the OPD. Administrative Director Harry Freebourn and Chief Hood are

working with the Montana Association of Counties and with a Law and Justice Interim Committee study to produce salary comparisons.

In Billings, Kris Copenhaver-Landon is the new Regional Deputy Public Defender. A flat fee contract with Terry Seifert, the attorney who has done all of the involuntary commitments in Billings in the past, is being considered. Mr. Seifert has to be available at virtually all times for commitment hearings due to the volume and the short notice requirement, which may justify the unusual flat-fee contract.

The Appellate office has petitioned the Montana Supreme Court for a Writ of Supervisory Control in regards to indigency determination. A lower court in Montana believes it is their responsibility to review indigency. OPD believes this is OPD's sole responsibility. If the Supreme Court chooses not to take action, clarification of the responsibility for determination of indigency may need to be addressed legislatively.

Chief Hood is working on several projects including the issue of attorney workload vs. caseload, the policy for fee-paying OPD clients, and the language change to clarify who we represent in dependent neglect cases.

Commissioner Sherwood asked if any progress had been made in finding a way for incarcerated clients to speak to their attorneys. Chief Hood responded that toll-free numbers are being established for most offices, and OPD reimburses contract attorneys for collect calls from jail.

Videoconference appearances, increasingly used to avoid the costs and security issues involved in transporting prisoners, were discussed. Commissioner Donovan suggested advocating for prisoners' right to appear in person, and in their own clothes.

- *Legislative Update/Reporting 47-1-106 (9) MCA*
Chief Hood discussed the legislative proposals for the upcoming session (exhibit 2). Chief Hood will meet with the Attorney General's office to determine their position on the electronic recording bill (LC 1343 in the last session, now LC 360) that will be reintroduced, but no opposition is expected. The other two legislative items were recommended by the Montana Advocacy Program and accepted by the Commission.

Chief Hood identified another issue that could possibly require new legislation. Due to the inherent conflict of interest in representing all of the parties in dependent neglect cases (parent, child, guardian ad litem,) she would like to return responsibility for appointing attorneys for the child and the guardian ad litem to the courts. This would also require returning the funding to the courts that was reallocated to the OPD. Chief Hood will pursue this possibility with Chief Justice Karla Gray and the District Court Council. Commissioners Sherwood, Donovan and Taylor concurred with this approach.

Mr. Freebourn described the report that is due to the Governor, the Legislature and the Supreme Court on December 1, 2006. The report requirements are detailed in 47-1-105(9), MCA. These requirements include policies; standards; and caseload, training and cost data.

During the upcoming legislative session, Mr. Freebourn will assign staff to monitor not only the three legislative items that we are introducing, but also other legislation that may affect OPD. He and Chief Hood will maintain an office in Helena throughout the session. At the request of Commissioner Veazey, Mr. Freebourn will investigate the potential impact of CI 97 on the public defender system. CI97 is the constitutional initiative to limiting the increase in appropriations to the combined growth rate of population and inflation, or the largest spending limit for any previous biennium.

- *Establish Regional Community Advisory Councils*

The role of regional advisory councils as a way to involve the public and provide community support was explored. Dorothy Bradley, Eric Bryson, Dan Roth, and Bill Tietz served on the Bozeman Public Defender Advisory Committee (BPDAC), and they joined the meeting by conference call to share their experience. The BPDAC consisted of eight members, representing the courts, the city, the general public and private bar members, with Ms. Bradley acting as liaison. Their purpose was to develop a new model for the Bozeman public defender system, and they looked at both procedural and institutional changes. The group agreed that this model could benefit the statewide public defender system by promoting communication and improving public access to the system. They suggested that meeting by teleconference would allow participation from all areas of the state without the need for excessive travel. The eight-member group was considered to be a good working size, but ensuring that all interests are represented is more important than group size. The BPDAC members enthusiastically supported the idea of regional councils, and some would be willing to serve again on such a group.

- *GANT Chart (Harry Freebourn)*

Mr. Freebourn reviewed the progress of the tasks on the GANT chart (exhibit 3), many of which are totally complete. Implementation of JustWare and the development of a case management program will be discussed in detail by IT Manager Teri Heiland later on the agenda.

Chief Hood, Mr. Freebourn and Chairman Taylor met with budget director David Ewer as part of the 2009 biennium budget process (number 43 on the GANT chart, and exhibit 4). Chairman Taylor asked that Commission members provide him with information regarding costs for various services in their areas. The cost of services throughout Montana will be part of the justification for the proposed increase in the hourly rate for contract attorneys. Conversation with Mr. Ewer will continue throughout the budgeting process, and Chairman Taylor will continue to advocate for supporting the mission of the public defender system.

Law and Justice Interim Committee Meeting

The Commission adjourned at 10:45 to attend the Law and Justice Interim Committee meeting, and reconvened at 1:20 p.m. after lunch. Commissioner Nardi asked that the minutes reflect that Chairman Taylor, Chief Hood and Mr. Freebourn did an excellent job of representing the public defender system to the Law and Justice Interim Committee.

Standards – General Discussion/Rulemaking/Legal Intern

There was lengthy discussion regarding the opinion letter from Dal Smilie, Chief Legal Counsel for the Department of Administration, (exhibit 5) regarding standards and administrative rules.

The Commission requested that Mr. Smilie produce a written opinion as to whether or not the standards should go through the administrative rules process. Mr. Smilie's opinion stated that it was not necessary, but that the Commission could go through the process "just to be safe." It was suggested that the Attorney General be consulted for an opinion regarding whether or not the standards should go through the administrative rules process, so that we don't find out down the road that we missed a step. Commissioner Nardi made a motion to submit the rules as drafted, and to forgo consulting the Attorney General for an opinion. Commissioner Donovan seconded. Further discussion focused on the need for the standards to be flexible (as opposed to the difficulty of changing administrative rules) and Mr. Smilie's strongly stated position in a previous meeting with Commission members that standards are not rules. The motion carried 9-1 with Chairman Taylor voting no.

Chairman Taylor announced that Rob Lavine is the intern that has been hired to gather comments and to format the standards. His contact information will be posted on the OPD website.

Commissioner Donovan proposed an amendment to the Standards in response to new federal regulations as follows: Amend and add the following language to the end of sub-section c. to paragraph 2 under subpart O. in VI: ". . . bribery, [delete "and"], child pornography, and violations of the Adam Walsh Child protection and Safety Act of 2006, including failure to register as a sex offender." Commissioner Sherwood moved to adopt the amendment. Commissioner Kaercher seconded. Motion carried.

Public Comment

No public comment was offered at this time.

Reports, continued

Chief Public Defender Report - Continued

- *Collective Bargaining Process (Paula Stoll)*

Paula Stoll, as our collective bargaining representative, will work with members of the Public Defender Commission Collective Bargaining Committee, Chief Hood, Mr. Freebourn and Human Resource Officer Barb Kain during the negotiation process. Ms. Stoll suggested that the management team gather prior to the next scheduled bargaining session (September 8) to discuss the concerns expressed by Commissioners Sherwood and Holton, and to review AFSCME's counterproposal. The collective bargaining agreement will use language consistent with the standards. Ms. Kain explained the competency-based state pay plan for attorneys and said that a comparison to the pay structure in prosecutorial offices is underway.

In state government, the goal is cooperative labor relations. Contracts are negotiated two years in advance so that they can be submitted as part of the biennial budget process.

- *Case Management System/Video Streaming (Teri Heiland/Diane Powers)*

Information Technology (IT) Manager Teri Heiland gave an update on IT operations. All offices except Havre and Hamilton are on the state network. Interviews are scheduled today for the fourth LAN position, to be located in Helena. IT staff are in the process of gathering information from Training Coordinator Eric Olson and others regarding the business needs for video streaming.

Diane Powers is the case management project manager. JustWare, the temporary system, has been mostly deployed (to be completed within the month) and training is underway. A team including attorneys and financial folks will help define the business requirements so that a Request for Information can be drafted for the permanent solution.

Legal research has been standardized using Lexis Nexis. IT staff will begin developing OPD brief banks. Issues identified include the need to standardize across the system, selection of briefs to include only best practices, reducing duplication of data available through the courts, and easy searches. Developing secure areas on the website and the need for contract attorneys to be able to access these resources were also discussed.

- *Preliminary Attorney Performance Evaluation Process/Procedure*
A draft of the Attorney Evaluation Form (exhibit 6) is comparable to the forms that will be used for contract attorneys and non-attorney staff. Eric Olson, Chief Hood, the Regional Deputy Public Defender and the Managing Attorney will conduct performance appraisals for FTE attorneys. Contracts Manager Larry Murphy and the Regional Deputy Public Defender will handle contract attorneys. Every contractor and staff member will be evaluated annually beginning in September, so there will be some field testing of the form prior to the next meeting. A draft policy and a proposed standard will be presented at the next Commission meeting.
- *Pro Bono Policy*
The Attorney General's Pro Bono Policy (exhibit 7) defines the use of agency resources and encourages Department of Justice attorneys to contribute 50 hours per year of pro bono work. Chief Hood thought that 50 hours was excessive for attorneys doing public defender work, because they are already doing a significant amount of additional work that doesn't strictly qualify as pro bono work. Commissioner Nardi will draft a policy based on the Attorney General's policy, paying particular attention to modifying the conflict of interest area. He will also refer to the Governor's office pro bono policy.
- *Grievance Procedure (Eric Olson)*
The draft client Grievance Procedure (exhibit 8) was discussed. The key elements are to identify the client complaint and to provide a speedy resolution. Grievance officers may include Mr. Olson, Mr. Murphy, Chief Hood, Regional Deputy Public Defenders and Managing Attorneys. The policy will be clarified so that clients know where to submit their written complaints. A more user-friendly client document will also be created. Chief Hood has statutory responsibility for implementing a grievance policy, so it will be distributed to the regional offices to begin field testing next week. By statute, office staff must be aware of the procedures in place to assist clients in making a complaint.
- *Training Coordinator Update (Eric Olson)*
Mr. Olson reported that investigator training was held in late August. Upcoming events include Trial Skills Boot Camp for new trial attorneys, Mental Health Advocacy training, and Juvenile Justice training. Mr. Olson continues to explore various delivery methods to provide "desktop" training and to develop a multi-media training library. He is also interested in acquiring legal textbooks and manuals for the training library.

- *Contract Officer Update (Larry Murphy)*
Mr. Murphy described the wide range of invoices received for the initial billing period, ending July 31, as well as some of the problems he encountered. Payment has been made within 30 days of initial receipt at the regional office for all invoices except those with questionable charges. Mr. Murphy has been carefully reviewing the invoices to determine if the billing practices are appropriate and to ensure that any associates working on contract cases are fully qualified. Most of these are one-time issues and will be resolved shortly. Mr. Murphy will compile a vendor listing for professional services for use by the regional offices, and will urge the regional offices to use our staff investigators when possible to help contain costs.
- *Administrative Rules Process Update (Harry Freebourn)*
A correction to rule V (5) of the proposed Administrative Rules (exhibit 9) will be made to read “*in camera*” inspection as requested by Chairman Taylor. A public hearing will be held on September 27 in Helena, and written comments on the proposed rules will be accepted until October 5. Comments can be directed to Mr. Murphy, the hearing officer.
- *Financial Update/Audit (Harry Freebourn)*
Mr. Freebourn reviewed the Financial Report for July 1-31, 2006 (exhibit 10), noting that the regional costs so far reflect very few vendor payments. Vendors will begin billing OPD in August for July services, and will then bill every month thereafter. The Budget Committee will meet prior to the next Commission meeting to discuss the type and amount of detail they would like to see in the monthly reports. The Budget Committee will also review the monthly reports prior to presenting them to the full Commission.

Initial word is that OPD’s financial compliance audit for FY 2006 has no “audit exceptions”, although the official report has not yet been received.

Conflict Coordinator Report (Kerry Newcomer)

Mr. Newcomer gave highlights from his written report (exhibit 11). His experience of the initial billing period mirrored that of Mr. Murphy, requiring a large amount of time and effort to review the invoices before approving them for payment. Mr. Newcomer received authorization to use the letterhead included in his report as Exhibit 1.

Mr. Newcomer will be on contract through the end of November. Chairman Taylor asked Mr. Newcomer to provide the intern, Mr. Lavine, with some recommendations regarding the future direction of the conflict management system. Chairman Taylor, Sheri Heffelfinger, Chief Hood and Mr. Murphy will share policies from other systems with Mr. Newcomer and Mr. Lavine that may be helpful.

Brief Update to ABA Ten Principles of a Public Defense Delivery System (Dan Donovan)

Commissioner Donovan distributed articles from *The Champion* and *The Nation* describing Montana’s visionary work as the first state to implement a public defender system based on the ABA Ten Principles (exhibit 12). He expressed his appreciation for the hard work of the staff and the Commission in making the new system a reality.

Chief Appellate Defender Report (Chief Jim Wheelis)

Chief Wheelis provided a handout (exhibit 13) consisting of a summary of the current caseload in the appellate office, the procedure on appeal, and the appointment of appellate defender form. The appellate office will be fully staffed by mid-September, and things are going well so far, with great cooperation from the regional offices.

The Petition for Writ of Supervisory Control regarding the indigency determination issue has been filed. As mentioned earlier, if the Supreme Court chooses not to take action, a legislative remedy may be needed.

Chief Wheelis is waiting for the right case to address bail issues in Bozeman, Missoula and Kalispell. Some of the conditions that are being added to bail in these areas don't relate to ensuring that the client appears as scheduled, but instead amount to punishment prior to conviction.

Chief Hood complimented Chief Wheelis and his staff on the enormous amount of good work they've produced since July 1.

Public Comment

Don Kinman, Executive Director of AFSCME, shared his sense of urgency regarding CI 97, which he thinks if passed can upset all the work the Public Defender Commission has accomplished to date.

Mr. Kinman expressed optimism that collective bargaining agreement negotiations will be completed cordially and on a short timetable. He offered to make training available in how to conduct regular labor/management meetings, which he hopes will be part of the contract. Commissioner Sherwood asked Mr. Kinman to review the Standards from a labor point of view.

Scott Crichton, Executive Director of the ACLU, reported that the Law and Justice Interim Committee voted to go forward with the legislation proposed by the public defender system. He noted that the systemic change that the Law and Justice Interim Committee has undertaken serves a broad population, not just people accused of crimes, and this is one reason that costs continue to climb. He complimented the Commission and the staff on their work to date.

Old Business/New Business (*Action Items)

Committee assignments (exhibit 14) are on the website. Commission members are asked to review the listing and advise Chairman Taylor if assignments need to be changed or if specific committees are no longer needed.

Adjourn

The meeting adjourned at approximately 5:05 p.m.

Exhibits 1 – 14 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>. Exhibits 15-16, which were distributed but not discussed at this meeting, are also available on the website.